Supreme Court, U.S.
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No. 91-1036

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM JONES and JOSEPH LOVETT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the acquittal of petitioners in the Southern District of Florida for their participation in a drug conspiracy bars their prosecution in the Southern District of Georgia on the drug conspiracy charges in this case, where their participation in the conspiracy in this case is alleged to have continued past the date of their indictment in the prior case.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 31a) is unpublished, but the decision is noted at 943 F.2d 1318 (Table). The opinions of the district court (Pet. App. 19a-30a) and of the magistrate (Pet. App. 1a-18a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1991, and a petition for rehearing was denied on September 23, 1991. Pet. App. 32a. The petition for a writ of certiorari was filed on December 23, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 12, 1989, petitioners and a number of co-defendants were charged in the United States District Court for the Southern District of Georgia with various violations of federal drug laws. Count 1, the only count at issue here, named both petitioners as members of a drug conspiracy that operated from 1979 through the date of the indictment, in violation of 21 U.S.C. 846.[1] Petitioners moved to dismiss the conspiracy charge, claiming that it was barred on double jeopardy grounds as a result of their 1987 prosecution on drug conspiracy charges in the Southern District of Florida. The district court denied the motion and the court of appeals affirmed.

1. The indictment in this case alleged that, from 1979 through 1989, petitioners participated with 30 co-defendants in a broad conspiracy to distribute cocaine, marijuana, and heroin. The conspirators were alleged to have acquired the drugs in South Florida and other places and to have distributed them in South Georgia and elsewhere. Petitioners were named in six of the 81 overt acts listed in the indictment; each of those overt acts took place in 1988 or later. Pet. App. 26a-27a; Pet. App. 2a.

2. In February 1987, both petitioners were charged, along with four co-defendants, in a two-count indictment filed in the Southern District of Florida. Count 1 charged petitioners with conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Pet. App. 2a. Count 2 charged petitioners with attempted distribution of

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[1] Petitioner Jones was also charged in three additional counts with distributing large quantities of cocaine and/or marijuana on specific dates in 1988 and 1989, in violation of 21 U.S.C. 841(a)(1).

cocaine, also in violation of 21 U.S.C. 846. All of the evidence at trial related to petitioners' activities during two days in February 1987, when they attempted to buy six kilograms of cocaine from an undercover police officer. Pet. App. 26a. Both petitioners were acquitted of the conspiracy charge, but petitioner Lovett was found guilty of the attempted possession with intent to distribute charge. See *United States* v. *Garcia*, 854 F.2d 1280, 1281 (11th Cir. 1988) (opinion affirming convictions of petitioner Lovett and three of his Florida co-defendants), cert. denied, 489 U.S. 1031 (1989).

3. Petitioners' motion to dismiss the instant conspiracy count on double jeopardy grounds was referred to a magistrate, who recommended that the motion be granted. Pet. App. 1a-18a. The district court rejected that recommendation, applying the five-factor analysis of *United States* v. *Marable*, 578 F.2d 151, 154 (5th Cir. 1978), for determining whether two conspiracies constitute "the same offense" for double jeopardy purposes. The court found that (1) "the time frames of the two [conspiracy] indictments overlap," Pet. App. 23a; (2) with the exception of petitioners, none of the six co-conspirators named in the Florida case were among the 32 co-conspirators named in the indictment in this case, Pet. App. 23a-25a; (3) the statutory offenses charged in the two indictments were identical, Pet. App. 26a; (4) the "indictments and evidence in the [two] cases at hand reveal only general similarities," especially in light of the broad-ranging nature of the indictment in this case and the fact that the evidence at the Florida trial was limited to events that occurred on two days in February 1987, Pet. App. 26a-28a; and (5) the "geographic locations of

the two indictments overlap," Pet. App. 28a. After considering all of those factors, the court concluded "that the Florida and Georgia indictments charge separate offenses." *Ibid.*

In an alternative holding, the district court ruled that "even assuming that the [petitioners] were involved in the Georgia conspiracy before their Florida arrest, and that the Florida and Georgia indictments allege a single conspiracy, their later participation in that conspiracy constitutes a new offense for purposes of double jeopardy law." Pet. App. 29a. Any other result, explained the court, would be "contrary to sound logic" because "a defendant would be immunized indefinitely for his further participation in a conspiracy after his previous arrest and trial for that offense." *Ibid.*

The court of appeals affirmed in an unpublished order adopting the reasoning of the district court. Pet. App. 31a.

ARGUMENT

Petitioners renew their contention that their prosecution on the Florida conspiracy charge should bar their prosecution on the conspiracy count in the Georgia indictment, notwithstanding the fact that they are alleged to have participated in the Georgia conspiracy after the date of their indictment in Florida.

1. The district court correctly found that the two indictments charged distinct conspiracies under the totality of the circumstances test traditionally employed by the courts to determine whether two conspiracies are the same for double jeopardy purposes. See, *e.g.*, *United States* v. *Ruggiero*, 754 F.2d 927, 932 (11th Cir.), cert. denied, 471 U.S. 1127 (1985); *United States* v. *Langella*, 804 F.2d 185, 189 (2d

Cir. 1986); *United States* v. *MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986); *United States* v. *Marable*, 578 F.2d 151, 154 (5th Cir. 1978). Aside from petitioners, there was no overlap in personnel between the two conspiracies. Although both conspiracies involved transportation of drugs by motor vehicle and purchase of drugs in South Florida, the district court correctly observed that "numerous unrelated drug conspiracies obtain narcotics in the South Florida area every day and transport the drugs in motor vehicles." Pet. App. 27a-28a. Moreover, there was no evidence that the drugs whose purchase was at issue in the Florida case were destined for sale through the South Georgia network involved in the instant case. See Pet. App. 26a. In any event, the district court's factual determination that the two conspiracies were distinct does not warrant further review.

2. Quite apart from the fact that the two conspiracies were distinct, petitioners' successive prosecutions were permissible because the Georgia conspiracy continued for two years past the date of the earlier indictment and all the overt acts charged against petitioners postdated that indictment. This Court held in *Garrett* v. *United States*, 471 U.S. 773, 791-792 (1985), that a defendant may be prosecuted successively for two offenses where the second-charged offense was not committed until after the earlier indictment, because the earlier indictment could not have put him in jeopardy for that offense. See *id.* at 797-798 (O'Connor, J., concurring). If the rule were to the contrary, a member of a conspiracy who has once been prosecuted for conspiring to commit certain offenses would obtain a lifetime grant of immunity from future prosecution for conspiring to commit the same offenses at a later date,

even if he continued indefinitely to promote the commission of those criminal acts through his membership in the conspiracy.[2]

3. In support of their claim, petitioners rely on *Grady* v. *Corbin*, 495 U.S. 508 (1990), in which the Court held that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 521. *Grady*, however, does not help petitioners' cause.

First, as both courts below concluded, the two conspiracies in this case did not charge the same conduct, but rather involved separate agreements among distinct groups of individuals to achieve different objectives. Contrary to petitioners' contention (Pet. 10-13), *United States* v. *Calderone*, 917 F.2d 717 (2d Cir. 1990), petition for cert. pending, No. 90-1527, does not provide support for any contrary conclusion. In *Calderone*, the Second Circuit held that the "conduct" at issue in a conspiracy prosecution, for purposes of analysis under *Grady*, is not the act of entering into the charged agreement, but rather the conduct from which the government seeks to have the jury infer the agreement. 917 F.2d at 721. Although we disagree with the Second Circuit's holding on that point, petitioners do not assert that the government intends in this prosecution to prove any of the conduct from which the government

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[2] Where, as here, the first prosecution results in an acquittal, the defendant would of course be protected in future prosecutions under the doctrine of collateral estoppel of *Ashe* v. *Swenson*, 397 U.S. 436 (1970). Petitioners do not cite *Ashe* and do not claim in their petition that the doctrine of collateral estoppel would bar the present prosecution.

sought to have the jury infer the conspiratorial agreement in the Florida prosecution. *Calderone*, accordingly, is of no assistance to petitioners.

Second, *Grady* did not renounce the rule allowing successive prosecutions where, as here, the offense charged in the later case had not been completed at the time of the indictment in the earlier case. See *United States* v. *Gambino*, 920 F.2d 1108, 1112-1113 (2d Cir. 1990), cert. denied, 112 S. Ct. 54 (1991), and petition for cert. pending, No. 91-31; *United States* v. *Scarpa*, 913 F.2d 993, 1013-1014 n.8 (2d Cir.), cert. denied, 111 S. Ct. 57 (1990); *United States* v. *Pungitore*, 910 F.2d 1084, 1111, 1115 & n.37 (3d Cir. 1990), cert. denied, 111 S. Ct. 2010 (1991). As noted above, that rule was established quite clearly in *Garrett*—a case cited in *Grady* with apparent approval, see 495 U.S. at 522—and the *Grady* Court itself expressly reaffirmed that the Double Jeopardy Clause does not bar a subsequent prosecution where "the State is unable to proceed on the more serious [latter] charge at the outset because the additional facts necessary to sustain that charge have not occurred." 495 U.S. at 516 n.7.[3]

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[3] Neither *Calderone* nor *United States* v. *Felix*, No. 90-1599, also cited by petitioners (Pet. 13-15), involved defendants who were prosecuted in a successive prosecution for criminal activity that continued past the date of their earlier indictment. Accordingly, the result in this case is unlikely to be affected by this Court's disposition of *Calderone* or *Felix*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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